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91-711

Supreme Court, U.S.
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No. ..-...

IN THE

# Supreme Court of the United States

October Term, 1991

ROBERT LOUIS ZEICHICK,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PAUL FITZGERALD,
SCOTT GAILEN, INC..
15910 Ventura Blvd., Suite 501
Encino, Calif. 91436,
(818) 501-0222
*Attorneys for Petitioner.*

## Question Presented.

Petitioner alleges that there was insufficient evidence to establish that an overt act was committed within the period of the statute of limitations and that the alleged two (2) overt acts set forth by the Court of Appeals were not overt acts and/or were constitutionally insufficient to establish the overt act element of the single crime charged.

The question presented herein is: If the sole evidence bearing upon an element of a crime consists of testimony requiring inferences, does due process demand that those inferences meet the reasonable doubt test (i.e. the evidence necessary to invoke the inference must be sufficient for a rational trier of fact to find the inferred fact beyond a reasonable doubt) or may these be subject only to the less stringent test of "more-likely-than-not" in order to achieve the requirement that a defendant be convicted only upon evidence which satisfies a fact finder of his guilt beyond a reasonable doubt?

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18 U.S.C. Section 894
28 U.S.C. Section 1254(1)

No. ..-...

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ROBERT LOUIS ZEICHICK,

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UNITED STATES OF AMERICA,

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

ROBERT LOUIS ZEICHICK, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

### Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported. A copy of the opinion appears in Appendix A hereto.

**Grounds for Jurisdiction of the Court**

a. On July 25, 1991 the United States Court of Appeals for the Ninth Circuit rendered an opinion which is attached in the appendix hereto as Exhibit "A" and which is the subject of review.

b. This Honorable Court has jurisdiction through 28 U.S.C. Section 1254(1).

**Statement of the Case**

a. Petitioner was charged in the United States District Court (Central District of California) in a one count indictment alleging a conspiracy to violate 18 U.S.C. Section 894 (the use of extortionate means to collect or attempt to collect credit).

b. The indictment was filed on June 23, 1988 and alleges that a conspiracy existed between the "Spring of 1981 to in or about July of 1983."

c. After a jury trial, petitioner was convicted and sentenced on March 27, 1989 to a four (4) year prison term.

d. The Court of Appeals for the Ninth Circuit affirmed the conviction by written opinion filed on July 25, 1991.

e. Petitioner is out on bail pending final disposition of his case.

## Facts of the Case

Although there were numerous witnesses, petitioner raised only the issue of the statute of limitations on appeal. It is clear from the indictment that according to the allegations of the prosecution, the conspiracy terminated in July of 1983 and the indictment was filed on June 23, 1988.

The prosection case consisted essentially of the testimony of Craig and Lawrence Fiato, brothers and alleged co-conspirators of petitioner, alleged victims, and surreptitious tape recordings of the Fiatos and petitioner made by the F.B.I.

It was the contention of petitioner that no overt act of the conspiracy had occurred within the five (5) years immediately preceding the filing of the indictment.

In its opinion, the Court of Appeals referred to two (2) instances of overt acts having occurred within the five (5) year period.

The first was the testimony of Craig Fiato that the "scheme lasted through 1983". (Ct. of App. Opn.p.2). The second was a tape recording of petitioner on July 5, 1983 wherein petitioner had met with a customer who was delinquent in his payments. (Ct. of App. Opn. p.3).

Petitioner contends that the above facts are the only ones germane to the issue presented.

**Argument**

It is clear from the dates alleged in the indictment of the conspiracy as well as from the date of filing of the indictment that the prosecution was fully aware that a statute of limitations problem existed in that the last day of the conspiracy being in July of 1983 was dangerously close to the five (5) year period ending June 23, 1988.

The prosecution's case took approximately twelve (12) days and consisted of ten (10) witnesses. Notwithstanding the above, the only items of evidence which the court of appeal has managed to glean from the evidence were the two as described above. The statement of Craig Fiato, cited by the Court of Appeals, was made in the initial part of his examination. The context of the statement was as follows:

"Q. Mr. Fiato, would you tell us when you decided to first work and cooperate with the United States Government?

A. Early in 1984.

Q. And what were the reasons that you decided to cooperate with the government?

A. Well, my house was bugged and my phones were tapped and I was in fear of being indicted in a loan sharking indictment.

Q. Had you been involved in a loan sharking operation at the time your telephone had been tapped and your house bugged?

A. Yes.

Q. Do you have a brother, sir?

A. Yes. Q. What is his name?

A. Lawrence Fiato.

Q. Was he also involved in this loan sharking operation with you?

A. Yes

Q. And approximately when was that loan sharking operation established?

A. 1981.

Q. Did it continue for a period of time?

A Yes

Q. For approximately how long?

A. For a couple of years, through 1983.

Q. Do you know an individual by the name of Robert Zeichick?

A. Yes, I do.

Q. And do you know him by any nickname?

A. Puggy.

Q. And how long have you known Robert Zeichick.

A. Since 1980."

(Reporter's Transcript, 1-24-89 pp.40, 41).

Thus, although Fiato made a general response to a general question about the loan sharking operation having lasted through 1983, Fiato was not asked about petitioner Zeichick until after the answer to this question and the answer, therefore, does not relate to the charges of Zeichick's conspiracy with Fiato. In other words, although Fiato made a statement that his loansharking operation continued through 1983 this was an answer which referred to him and his brother Lawrence and not to petitioner Zeichick who was not even mentioned up to that point. Further, the conclusory statement is not evidence that an overt act of the conspiracy occurred after June 23, 1983. The parties could have had an "operation" or "agreement" and done nothing about after June 23, 1983. Mr. Fiato was never asked by the prosecutor to testify as to any act in furtherance of the conspiracy after June 23, 1983.

Last, the Court of Appeals cited the following tape recording of petitioner and Fiato on 7-5-83.

"Zeichick: Ronnie, I saw him today.

Fiato: Yeah, what did he say?

Zeichick: Gee, I didn't know I owed you that much money. I said, well you don't even know what you owe

us...I said you're paying other people before you're paying us...I said, you piss me off that's what's wrong."

(Ct. of App. Opn.p.3).

If the person is Ron Murdock, a witness called by the prosecution, Mr. Murdock did not testify as to any extortionate acts by either Fiato or petitioner. (R.T. Vol.4 pp.29-145) Thus, although the Court of Appeals concluded:

"Nevertheless, from the content of the conversation, a rational jury could easily infer that "Ronnie was a loanshark's customer" (Ct. of App. opn. p.3). How? One can easily infer that Ronnie is a debtor but one cannot easily infer that Ronnie is a loanshark customer and thus an extortion victim. In addition to there being a lack of any evidence in the tape that petitioner threatened or otherwise extorted "Ronnie" the other evidence in the case, to wit: the testimony of Ron Murdock, completely negatives any extortion. It is, therefore, the case that the only person to whom the jury can relate the name "Ronnie" is a person who exonerated the petitioner. How can it be said that a jury can "easily infer that Ronnie was a loanshark customer"?

Without the evidence of an overt act after June 13, 1991 the case against petitioner must fail as having been brought outside of the Statute of limitations.

In 1970 this Honorable Court established that it is a constitutional requirement that the burden of proof to be carried by the prosecution in a criminal case is that of proof beyond a reasonable doubt. In Re Winship 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). Further, this court has established that it is not enough that a jury be instructed as to this principle, but that the evidence must actually be sufficiently strong enough to convict a defendant to be tested on appeal by whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in a light most favorable to the prosecution. Jackson v. Virginia 443 U.S.

307, 99 S.Ct. 2781, 61 L.Ed.2d. 560.

Petitioner maintains that the present Jackson standard is insufficiently explicit and that a reviewing court must be allowed to reverse a conviction where the only evidence consists of testimony that requires a jury to speculate on its meaning in order to convict a defendant.

Herein, the Court of Appeals stated that "a rational jury could easily infer that Ronnie was a loanshark customer. (Ct. of App. Opn. p.3).

In describing an inference and its place in criminal jurisprudence, this Honorable Court has held that "...the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the fact finder's responsibility at trial based on evidence adduced by the state, to find the ultimate facts beyond a reasonable doubt."

County Court of Ulster County, New York v. Allen 442 U.5.140, 156, 99 S.Ct. 2213, 2224, 60 L.Ed 2d.777 (1979).

Further, this court has implied that an inference in a criminal case must satisfy a reasonable doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt). Barnes v. United States 412 U.S. 837, 843, 93 S.Ct. 2357, 2361, 2362, 37 L.Ed2d 380 (1973). This is as opposed to a "more-likely-than-not" standard.

In the case at bar, the evidence does not even rise to the "more-likely-than-not" standard but requires that the jurors completely speculate on whether the evidence shows an overt act toward accomplishing the goals of a conspiracy. By allowing inferences to be made herein that have no rational connection to the fact to be proven, the appellate and trial courts have denied the petitioner due process of the law.

In Leary v. United States 395 U.5.6, 89 S.Ct. 1532, 23 L.Ed.2d. 57 (1969) the Court reserved the question of whether the more-likely-than-not or the reasonable doubt

standard controlled criminal cases with respect to inferences. In County Court of Ulster County v. Allen (supra) the court rejected an argument that a statutory permissive presumption must be judged by a "reasonable doubt" test rather than a "more-likely-than-not test. 442 U.S. 140, 167, 168, 99 S.Ct. 2213, 2229, 2230, 60 L.Ed.2d. 777. The rationale was that since the jury is not required to accept a permissive presumption the prosecution may rely on all of the evidence to meet the reasonable doubt standard whereas for a mandatory presumption the prosecution may rely on it as the sole evidence of guilt.

In the case at bar, the only evidence to support the existence of an overt act within the statutory period was that requiring an inference to be drawn. At the very least, in order to achieve due process, the inference should meet a "reasonable doubt" standard where the only evidence is that in support of the inference. If it does not, then a defendant will be subject to a conviction wherein an element of the crime (an overt act within the period of the statute of limitations) was not proven beyond a reasonable doubt in violation of the requirements of Jackson v. Virginia (supra).

Although petitioner maintains that the inferences in the case at bar do not even meet the more-likely-than-not standard, under no rational examination can they meet the reasonable doubt standard and petitioner has been denied due process.

DATED: OCTOBER 17, 1991 SCOTT GAILEN, INC.

PAUL FITZGERALD for
SCOTT GAILEN, INC.
Attorney for Petitioner
ROBERT ZEICHICK

FILED
JUL 25 1991
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

**Appendix A**
**NOT FOR PUBLICATION**
**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | No. 89-50194 |
| | ) | |
| Plaintiff-Appellee, | ) | D.C. No. CR-88-0522-JGD-1 |
| v. | ) | |
| | ) | |
| ROBERT ZEICHICK, | ) | MEMORANDUM* |
| | ) | |
| Defendant-Appellant. | ) | |
| | ) | |

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Submitted July 23, 1991**

Before: PREGERSON, D. NELSON and REINHARDT, Circuit Judges.

Robert Zeichick appeals his conviction following a jury trial for conspiracy to collect an extension of credit through extortionate means, in violation of 18 U.S.C. § 894.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Therefore, appellants request for oral argument is denied.

Zeichick contends that his conviction is barred by the five-year statute of limitations because the evidence was insufficient to establish an overt act in furtherance of the conspiracy within the statutory period. We have jurisdiction under 28 U.S.C. S 1291 and affirm.

Sufficient evidence to support a conviction exists if "a reasonable jury, after viewing the evidence in the light most favorable to the government, could have found the defendants guilty beyond a reasonable doubt of each essential element of the crime charged. United States v. Hernandez, 876 .2d 774, 777 (9th Cir.), cert. denied, 110 S. Ct. 179 (1989) (citation omitted); Jackson v. Virginia, 443 U.S. 307, 319 (1979).

"The elements of a criminal conspiracy include: (1) an illegal objective; (2) an agreement between two or more persons to accomplish that objective; (3) one or more overt acts in furtherance thereof; and (4) the requisite intent . . . . Proof of the act must be established within the period of limitations. United States v. Andreen, 628 F.2d 1236, 1248 (9th Cir. 1980) (citation omitted).

Here, Zeichick argues that the government failed to establish the commission of an overt act in furtherance of the conspiracy between June 23, 1983 and June 23, 1988, the day the indictment was filed. At trial, Craig Fiato, Zeichick's co-conspirator, testified for the government. He described the loanshark scheme where Zeichick and other co-conspirators lent money to many customers at extremely high interest rates. Fiato testified that the scheme lasted through 1983. To support Fiato's testimony, the government introduced thirteen tape recorded conversations between Zeichick and his co-conspirators. The taped conversations occurred between June 24, 1983 and July 6, 1983. The conversations generally involved collecting money from customers and evading detection by law enforcement officers.

Zeichick argues that the conversations discussed future acts and no evidence established that the acts actually occurred. Nevertheless, Fiato's testimony and the taped conversations indicate that outstanding loans to numerous customers were in existence after June 23, 1983. As late as July 5, 1983, Zeichick was recorded as saying he had met with a customer who was delinquent in his payments. [1]The evidence, when viewed in the light most favorable to the government, was sufficient to support the jury's finding that an overt act was committed in furtherance of the conspiracy during the statutory period. See United States v. Thomas, 887 F.2d 1341, 1348 (9th Cir. 1989) (evidence sufficient to allow jury to infer existence of conspiracy).

AFFIRMED.

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[1]The conversation reads, in part:

Zeichick: Ronnie, I saw him today.
Fiato: Yeah, what did he say? -
Zeichick: Gee, I didn't know I owed you that much money. I said, well you don't even know what you owe us...I said, you're paying other people before you're paying us...I said, you piss me off that's whats wrong.

ER Exhibit L.

Zeichick contends that "Ronnie" is not Ron Murdock, an identified customer. Nevertheless, from the content of the conversation, a rational jury could easily infer that "Ronnie" was a loanshark customer.